No. 21,253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA for the use and benefit of FLOATING FLOORS, INC., a corporation,

Appellant,

vs.

FEDERAL INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the District Court of the United States, Southern District of California, Central Division.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Walter Ely, Circuit Judge, James R. Browning, Circuit Judge, and Russell E. Smith, District Judge:

Appellant petitions this Court for a rehearing to reconsider the judgment entered in this action on July 19, 1967 for the following reasons.

Assuming, as the Court did, that the replacement panels were manufactured by Commercial for appellant and were appellant's panels when shipped to Shiff, the replacement panels were, therefore, the last material furnished by appellant. That fact seems to have escaped the attention of the Court in its Opinion. It is the "last furnishing" which *start*s the running of the 90 day notice period. [Public Buildings, Property, Etc., 40 U.S.C. §270b.] The Court erroneously concludes that the time for giving notice "had expired" before

the replacement panels were shipped and that there was no "extension" of the time for giving notice by the supplying of the replacements. The "Notice" time could not have "expired" when the "last furnishing" did not occur until March 31, 1964.

The affidavits, filed by appellant in opposition to the motion for summary judgment, amply show that Shiff believed that appellant was obligated to furnish the panels to Shiff in order that the contract could be completed. In his second affidavit, Beere says, regarding the March 17, 1964 conversation with Shiff's representative,

> "The conversation in which we engaged on that occasion again related to the necessity that replacement panels be furnished to the March Air Force Base job in order that the contract could be completed there. Shiff's representative told me that the Federal Government was claiming that the floor system was partially defective, did not meet requirements of or otherwise fulfill the contract, and that new panels conforming to the contract requirements would have to be furnished by Reeder, Floating Floors, and Commercial Steel." [R. 102.]

By the subcontract agreement between Reeder and Shiff, Reeder obligated itself to furnish all necessary labor, equipment, and material for the complete installation of the raised computer floor, in complete accordance with contract plans and specifications. [R. 25.] Reeder, in turn, made an agreement with appellant wherein appellant undertook to furnish each and all of the parts and material necessary for the installation of the floor system required by the Reeder-Shiff subcontract. [R. 3, 4.] This contractual obligation was

not denied by appellee. [R. 9.] The replacement panels, when supplied by appellant in order to complete its contract, constituted the "last material furnished by appellant." That fact is the TURNING POINT in this case.

The appellant asks the Court to reconsider the cases cited by appellant on pages 13 through 17 of its Opening Brief.

In *United States v. Gunnar I. Johnson & Son, Inc., et al.*, 310 F. 2d 899 (1962, 8th Cir.), the Court held the time for giving the 90 day Miller Act notice *commenced to run* (was not simply extended) when the defective parts necessary to complete the contract and installation were replaced. The Court in that case stated on page 903 that "An enforceable claim herefor arose for the first time when they were 'furnished' in usable condition. . . ."

In *T. F. Scholes, Inc., et al. v. United States of America for the Use and Benefit of Lock Joint Pipe Company*, 207 F. 2d 337 (1961, 10th Cir.), a delivery by the claimant to the prime contractor of 198 feet of pipe, long after a previous delivery of 800 feet of pipe by the claimant to a subcontractor, *started* the running of the Miller Act Notice time. The Court, in its Opinion at page 338, indicates that, if the last delivery were made pursuant to the claimant's contract with the subcontractor, the notice, sent within 90 days thereafter, was sufficient.

For the Court to conclude that, since the notice time had expired at the date of the conversations between Shiff and appellant, neither Shiff nor appellee were

in any way obligated to appellant, overlooks the real issue—*i.e.* whether the notice time had expired. For had it not, then there is no basis for saying appellee was not obligated to appellant. While Shiff may not have been obligated to seek out and attempt to obtain replacements from appellant, the fact remains it did, and it insisted appellant should furnish them in order that the contract could be completed. [R. 102.]

One cannot conclude, after the conversations between Shiff and appellant relating to the replacement panels, that the appellant simply acted as a disinterested volunteer in having the panels manufactured for its account. There is no dispute by appellee that these same panels were delivered to Shiff. In this posture, how can it be said there was no genuine issue of material fact as to whether the "last furnishing" occurred on March 31, 1964 and the notice given within 90 days thereafter was timely?

DILLAVOU, COX, CASTLE & NICHOLSON,
By MICHAEL M. WEEKES,
Attorneys for Appellant.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

MICHAEL M. WEEKES